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SENATE

REPORT
101-285

SWAP AGREEMENTS AND FORWARD CONTRACTS

MAY 14 (legislative day, APRIL 18), 1990.—Ordered to be printed

Mr. BIDEN, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany S. 396]

The Committee on the Judiciary, having considered an amendment in the nature of a substitute to S. 396 to amend title 11, United States Code, with respect to swap agreements and forward contracts, reports favorably thereon and recommends that the bill as amended do pass.

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I. PURPOSE

The purpose of S. 396 is to clarify U.S. bankruptcy law with respect to the treatment of swap agreements and forward contracts. The bill would provide certainty for swap transactions in the case of a default in bankruptcy and would make technical changes to the forward contract provisions already a part of the Bankruptcy Code (the "Code").

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II. Legislative History

100TH CONGRESS

Legislation addressing amendment the code regarding swap agreements was first introduced in the Senate by Senator DeConcini, with Senator Grassley, on April 13, 1988. This bill, S. 2279, was referred to the Committee on the Judiciary, Subcommittee on Courts and Administrative Practice, and a hearing was held on June 10, 1988. The bill was favorably reported out of the Judiciary Committee on October 5, 1988, without amendment. On October 14, 1988, S. 2279 passed the Senate without amendment by voice vote. No action was taken on the bill in the House of Representatives.

101ST CONGRESS

On February 9, 1989, Senator DeConcini, with Senator Grassley, reintroduced legislation to amend the Code concerning swap agreements, now numbered S. 396. The bill was referred to the Subcommittee on Courts and Administrative Practice. A subcommitte hearing was held on April 11, 1989, and the bill was approved for a full committee consideration on July 12, 1989, with an amendment in the nature of a substitute. The substitute amendment, introduced by Senator Grassley, included the provisions regarding forward contracts. On March 22, 1990, the Committee on the Judiciary favorably reported the amendment in the nature of a substitute to S. 396 on a voice vote.

III. Discussion

BACKGROUND

S. 396 amends the Code with respect to both forward contracts and swap agreements.

FORWARD CONTRACTS

The first forward contract provisions were added to the Code as part of the Bankruptcy Reform Act of 1978. Amendments were made in the forward contract provisions in 1982 and 1984.

A forward contract is a contract for the purchase, sale or other transfer of a commodity with a maturity date at least 2 days after the date the contract is entered into. This definition encompasses a broad array of transactions in commodities ranging from crude oil to foreign currencies which involve billions of dollars each year. Forward contracts play a central role in the movement of commodities among producers and users, as well as in the hedging of risks associated with these and other transactions.

The principal purpose of the Code's forward contract provisions is to prevent the insolvency of one party to a forward contract from threatening the solvency of the other party to the contract and, in doing so, the solvency of some or all of the other participants in the market in which the second party does business. One of the means through which the Code attempts to achieve this purpose is section 556, which authorizes a forward contract merchant to exercise its contractual rights to liquidate outstanding forward contracts with a counterparty that becomes the subject of a liquidation or reorga-

nization proceeding under the Code. A forward contract merchant is a person whose business consists in whole or in part of entering into forward contracts as or with a commodity merchant.

Section 362(b)(6) of the Code also permits a forward contract merchant to set off certain amounts it may be owed by an insolvent counterparty with respect to forward contracts against funds or other property of the insolvent counterparty it holds, or against funds it may owe to the counterparty. In conjunction with section 556, section 362(b)(6) permits a forward contract merchant to net positive and negative exposures resulting from the liquidation of some or all of its open forward contracts with an insolvent counterparty, as well as any other amounts that may arise out of or be owed in connection with those contracts.

In order to achieve their intended purposes, the scope of the forward contract provisions must be very clear. If there is uncertainity with respect to such matters as whether a particualr contract qualifies as a forward contract or whether a particular obligation is eligible for setoff in connection with a forward contract, it may not be possible for market participants to use the forward contract provisions in a way that will fully achieve their market protection objectives. S. 626 would prevent such problems by correcting certain ambiguities that have been identified in the present language of the Code's forward contract provisions.

SWAP AGREEMENTS

Interest rate and currency swap agreements are a rapidly growing and vital risk management tool in world financial markets. Financial institutions and corporations use swap agreements to minimize exposure to adverse changes in interest and currency exchange rates. Swaps can also be used, in effect, to convert a particular financial asset from fixed to floating rate and from one currency to another. Currency swaps and foreign exchange transactions also play an important role in international trade as a means of hedging against currency fluctuations. Commercial banks, investment banks, thrift institutions, insurance companies, domestic and multinational corporations, foreign governments, and United States and foreign government-sponsored entities all participate in the swaps market.

A typical single-currency interest rate swap transaction involves an agreement where one party agrees to make periodic payments based on a fixed rate of interest while the other agrees to make periodic payments based on a floating rate. Payments are calculated on the basis of a hypothetical principal or "notional" amount and payment amounts are typically netted on common dates even in the absence of default. The principal or notional amounts generally are not transferred. Swap agreements usually last from 1 to 12 years.

DEFAULT PROVISIONS IN SWAP AGREEMENTS

Swap agreements generally provide that upon termination of the agreement for default, all transactions between the parties are terminated, a single net amount due is determined, and the defaulting party pays the amount due to the nondefaulting party. The imme-

diate termination for default and the netting provisions are critical aspects of swap transactions and are necessary for the protection of all parties in light of the potential for rapid changes in the financial markets. Currently, the automatic stay provision of the Code could be interpreted to bar immediate termination of outstanding transactions. In addition, even where all transactions between two parties are conducted under a single master agreement, a bankruptcy trustee could try to "cherrypick" by assuming favorable transactions while rejecting unfavorable ones. If netting is not allowed and the debtor or trustee is permitted to cherrypick, the potential exposure for nondefaulting parties is drastically increased.

EFFECT OF BANKRUPTCY CODE ON SWAP AGREEMENTS

Concern about the effect of the Code on these transactions leads this committee to favorably report S. 396, which would provide protection for the operation of interest rate and currency swap agreements when one of the parties files for bankruptcy protection.

Three specific problem areas are addressed in the legislation. First, the bill amends section 362 to exempt the contractual rights to termination of the agreement and setoff of mutual debts and claims arising under or in connection with swap agreements from the automatic stay provisions of the Code. This exception permits the prompt termination of the agreement and allows the netting rights to be exercised. This will reduce the potential market impact of the bankruptcy filing by allowing immediate termination and netting, eliminating the uncertainty otherwise caused by a bankruptcy filing.

Second, the bill assures that the contractual right of a nondefaulting party to terminate a swap agreement cannot be stayed by any court or agency acting under the Code. Counterparties will not be exposed to efforts by a bankruptcy trustee to assume these agreements under section 365 of the Code.

Third, the bill will make clear that ordinary transfers made or setoffs effected under the swap agreement immediately before a bankruptcy case cannot be set aside by a bankruptcy trustee. This exception to the preference and other avoidance provisions recognizes that payments made and setoffs effected under or in connection with the agreement, including any security arrangement related thereto, must be protected in order to preserve the functioning of the market and to eliminate any concern that Code provisions could be read to preclude the exercise of contractual rights of prebankruptcy netting or setoff. This is particularly important to swap participants since netting is the normal, intended course of dealing in swap transactions unlike ordinary commercial transactions where setoff is an extraordinary remedy.

These changes closely parallel those enacted in 1982 and 1984 by Congress for securities contracts, forward contracts, commodity contracts, and repurchase agreements.

IV. VOTE OF THE COMMITTEE

On March 22, 1990, with a quorum present, by voice vote, the Committee on the Judiciary unanimously ordered the bill, S. 396, favorably reported.

V. TEXT OF S. 396

[101st Cong., 1st Sess.]

A BILL To amend title 11 of the United States Code, the Bankruptcy Code, regarding swap agreements

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 101 of title 11, United States Code, is amended by—

(1) inserting in paragraph (24) "as defined in section 761(8) of this title, or any similar good, article, service, right, or interest which is presently or in the future becomes the subject of dealing in the forward contract trade," after "transfer of a commodity," and inserting ", including, but not limited to, a repurchase transaction, reverse repurchase transaction, consignment, lease, swap, hedge transaction, deposit, loan, option, allocated transaction, unallocated transaction, or any combination thereof or option thereon" after "entered into" at the end of the same paragraph;

(2) striking out "commodities" in paragraph (25) and inserting in lieu thereof "a commodity, as defined in section 761(8) of this title, or any similar good, article, service, right, or interest which is presently or in the future becomes the subject of dealing in the forward contract trade";

(3) redesignating paragraphs (49) through (51) and any references to such paragraph as paragraphs (55) through (57);

(4) inserting between paragraphs (52) and (55) as redesignated herein, the following:

"(53) 'swap agreement' means an agreement, including terms and conditions incorporated by reference therein, which is a rate swap agreement, basis swap, forward rate agreement, commodity swap, interest rate option purchased, forward foreign exchange agreement, rate cap agreement, rate floor agreement, rate collar agreement, currency swap agreement, cross-currency rate swap agreement, currency option purchased or any other similar agreement or combination thereof (including any option to enter into any of the foregoing), and a master agreement for any of the foregoing together with all supplements shall be considered one swap agreement;

"(54) 'swap participant' means an entity that, on any day before the date of the filing of the petition, has an outstanding swap agreement with the debtor,";

(5) redesignating paragraphs (46) through (48) and any reference to such paragraphs as paragraphs (50) through (52);

(6) redesignating paragraphs (34) through (45), and any reference to such paragraphs as paragraphs (37) through (48);

(7) inserting between paragraphs (48) and (50) as redesignated herein, the following—

"(49) 'settlement payment' means, for purposes of the forward contract provisions of this title, a preliminary settlement payment, a partial settlement payment, an interim settlement payment, a settlement payment on account, a final settlement payment, a net settlement payment, or any other similar payment commonly used in the forward contract trade,";

(8) redesignating paragraphs (32) and (33) and any reference to such paragraphs as paragraphs (33) and (34);

(9) redesignating paragraphs (53) and any reference to such paragraph as paragraph (36);

(10) inserting between paragraphs (34) and (36) as redesignated herein, the following:

"(35) 'margin payment' means, for purposes of the forward contract provisions of this title, payment or deposit of cash, a security or other property, that is commonly known in the forward contract trade as original margin, initial margin, maintenance margin, or variation margin, including market to market payments or variation payments;"; and

(11) redesignating paragraph (52) and any reference to such paragraph as paragraph (32).

SEC. 2. Section 362(b) of title 11, United States Code, is amended—

(1) in paragraph (6) by—

(A) striking out "section 741(5) or 761(15)" and inserting in lieu thereof "section 101(35), 741(5), or 761(15)", and

(B) striking out "section 741(8)" and inserting in lieu thereof "section 101(49) or 741(8)"; and

(2) striking out "or" at the end of paragraph (12);

(3) striking out the period at the end of paragraph (13) and inserting in lieu thereof "; or"; and

(4) inserting at the end thereof of the following:

"(14) under subsection (a) of this section, of the setoff by a swap participant, of any mutual debt and claim under or in connection with one or more swap agreements that constitutes the setoff of a claim against the debtor for any payment due from the debtor under or in connection with swap agreements against any payment due to the debtor from the swap participant under or in connection with the swap agreements or against cash, securities, or other property of the debtor held by or due from such swap participant to guarantee, secure or settle swap agreements.".

SEC. 3. Section 546 of title 11, United States Code, is amended—

(1) in subsection (e) by—

(A) striking out "section 741(5) or 761(15)" and inserting in lieu thereof "section 101(35), 741(5) or 761(15)"; and

(B) striking out "section 741(8)" and inserting in lieu thereof "section 101(49) or 741(8)"; and

(2) by adding at the end thereof the following:

"(g) Notwithstanding sections 544, 545, 547, 548(a)(2) and 548(b) of this title, the trustee may not avoid a transfer under a swap agreement, made by or to a swap participant, in connection with a swap agreement and that is made before the commencement of the case, except under section 548(a)(1) of this title.".

SEC. 4. Section 548 of title 11, United States Code, is amended—

(1) in subsection (d)(2) by—

(A) striking out "and" at the end of subparagraph (B);

(B) striking out the period at the end of subparagraph (C) and inserting in lieu thereof "; and"; and

(C) adding at the end thereof the following:

"(D) a swap participant that receives a transfer in connection with a swap agreement, as defined in section 101(53) of this title, takes for value to the extent of such transfer."; and

(2) in subsection (d)(2)(B) by—

(A) striking out "section 741(5) or 761(15)" and inserting in lieu thereof "section 101(35), 741(5), or 761(15)"; and

(B) striking out "section 741(8)" and inserting in lieu thereof "section 101(49) or 741(8)".

SEC. 5. Section 553(b)(1) of title 11, United States Code, is amended by inserting "362(b)(14)," after "362(b)(7),".

SEC. 6. Section 556 of title 11, United States Code, is amended by striking out the period at the end of the last sentence of the section and adding at the end of that sentence "and a right whether or not evidenced in writing, arising under common law, under law merchant or by reason of normal business practice.".

SEC. 7. Subchapter III of chapter 5 of title 11, United States Code, is amended by adding at the end thereof the following:

"§ 560. Contractual right to terminate a swap agreement

"The exercise of any contractual rights of a swap participant to cause the termination of a swap agreement because of a condition of the kind specified in section 365(e)(1) of this title or to set off or net out any termination values or payment amounts arising under or in connection with one or more swap agreements shall not be stayed, avoided, or otherwise limited by operation of any provision of this title or by order of a court or administrative agency in any proceeding under this title. As used in this section, the term 'contractual right' includes a right, whether or not evidened in writing, arising under common law, under law merchant or by reason of normal business practice.".

Amend the title to read as follows:

An Act to amend title 11 of the United States Code, the Bankruptcy Code, regarding swap agreements and forward contracts.

VI. SECTION-BY-SECTION ANALYSIS

Section 1(1) would amend the forward contract definition in Code section 101(24). The current definition specifically excludes commodity contracts in order to make clear that the forward contract provisions do not apply to futures contracts, leverage contracts and other types of contracts that are covered by the special commodity contract provisions of subchapter IV of chapter 7 of the Code.

However, the Code does not expressly define the term "commodity" for purposes of the forward contract definition. This has resulted in some uncertainty concerning the meaning of the term, as well as concerning the scope of the forward contract provisions. The Code does define commodities for purposes of the commodity contract provisions. Code section 761(8) incorporates by reference the definition of the term "commodity" included in the Commodity Exchange Act (the CEA), 7 U.S.C.A. 1 et seq. The CEA defines a commodity as any good or article, or any service, right or interest in which futures contracts are dealt in presently or in the future.

See 7. U.S.C.A. 2. Section 1(1) of the bill would, among other things, make the CEA definition applicable to the forward contract definition.

The CEA definition covers a broad array of commodities, but does not cover all of the commodities that are the subject of forward contract. For example, many metal bearing dores and ores, such as gold dore and bauxite, most types and grades of crude oil and some foreign currencies are not the subject of futures contracts and, therefore do not fall within the CEA definition of commodities. They are, however, the subjects of forward contracts and need to be included within the scope of the definition of forward contracts.

Section 1(1) of the bill resolves this problem by providing that any good, article, service, right or interest that is "similar" to a commodity, and that is now or in the future the subject of dealing in the forward contract trade, also may be the subject of a forward contract. As used in section 1(1), the term "similar" is intended to be interpreted broadly to include items similar in nature or traded in a manner similar to those commodities included in the CEA definition.

When the forward contract definition was adopted in 1984, the terms "purchase", "sale" and "transfer" were to be used in their broadest sense to include, at least, repurchase agreements, reverse repurchase agreements, consignments, leases, swaps, hedge transactions, commercial options, deposits, loans and allocated and unallocated transactions, as well as any combination of these transactions. See S. Rept. 98-65, 98th Cong., 1st Sess. 70, 74 (1983). Notwithstanding this legislative history, whether the definition includes all of these transactions has been questioned. In order to resolve this uncertainty, the bill would amend the forward contract definiton to specifically include, without limitation, each of the transactions listed above, as well as combinations of such transactions or options thereof.

Section 1(2) of the bill would amend the forward contract merchant definition in Code section 101(25) by deleting "commodities" and inserting in lieu thereof "a commodity, as defined in section 761(8) of this title, or any similar good, article, service, right, or interest that is presently or in the future becomes the subject of dealing in the forward contract trade." This change will conform the forward contract merchant definition with the similar change made in the definition of forward contracts.

Section 1(3) redesignates paragraphs (49) through (51) of Code section 101 as paragraphs (55) through (57). The purpose of the paragraph redesignations made thoughout the legislation is to place all definitions listed in section 101 in alphabetical order.

Section 1(4) creates two new subsections under section 101 to define "swap agreement" and "swap participant." The new definition of swap agreements specifically lists certain types of agreements which fall within the definition. In addition to the listed transactions, the definition includes "any other similar agreement or combination thereof (including any option to enter into any of the foregoing)." This is intended to recognize that these agreements evolve over time and to provide that all such similar agreements are entitled to the protections of this bill. Furthermore, the new

definition provides that a master agreement for any of the referenced transactions and all its supplements "shall be considered one swap agreement." This is intended to assure the right of netting and to bar any effort to cherrypick. Incorporated into this language is the concept of netting by novation.

Netting or netting out is the process by which the parties to a swap agreement determine, at the expiration of the agreement or upon default, which party is owed how much by netting out or setting off all amounts owed by each party to the other. By recognizing all swap agreements between the same parties covered by a Master swap agreement as "one swap agreement", a single net amount owed by the defaulting party to the nondefaulting party can be determined.

Swap participant is defined as "an entity that, on any day before the filing of the petition, has an outstanding swap agreement with the debtor." This allows any entity who has a swap agreement with the debtor at any time before the bankruptcy filing falls to be considered a swap participant.

Section 1(5) redesignates paragraphs (46) through (48) as paragraphs (50) through (52).

Section 1(6) redesignates paragraphs (34) through (45) as paragraphs (37) through (48).

Section 1(7) defines the terms "settlement payment" for purposes of the Code's forward contract provisions. This definition is modeled on, and is virtually identical to, the Code's securities contract settlement payment definition. See Code section 741(8). The one substantive difference between the two definitions is the inclusion of a "net settlement payment" in the forward contract settlement payment definition. The express inclusion of this term in the definition recognizes the fact that the netting of forward contracts is a regular practice of the forward contracts trade and that the payment obligations that result from this netting should be treated as settlement payments.

Section 1(8) redesignates paragraphs (32) and (33) as paragraphs (33) and (34).

Section 1(9) redesignates paragraph (53) as paragraph (36).

Section 1(10) creates a separation definition for margin payment. The Code makes various references to forward contract margin payments but does not expressly define it. The language of the proposed forward contract margin payment definition is virtually identical to the margin provisions of the margin payment definition the Code utilizes with respect to commodity contracts. See section 761(15) of the Code.

Section 1(11) redesignates paragraph (52) as paragraph (32).

Section 2 makes conforming amendments to section 362(b) of the Code. Subsection (b) contains the exceptions to the automatic stay provisions. Section 2(1) of the bill adds new subsections 101(35) and 101(49) defining settlement payments and margin payments, to the exceptions from the automatic stay. Section 2(4) of the bill provides an exception from the automatic stay to permit a swap participant to setoff claims against the debtor against amounts due to the debtor under or in connection with a swap agreement. The nondebtor can also exercise setoff rights against any cash, securities, or other property of the debtor held by or due from a swap partici-

pant to guarantee, secure or settle the swap agreement. Under this provision, the non-debtor party can cause the liquidation of any collateral it holds or that is held for its benefit.

Section 3(1) amends section 546(e) of the Code by adding cross-references to new sections 101(35) and 101(49) to protect margin payments and settlement payments from avoidance under the bankruptcy avoiding powers. Section 3(2) of the bill adds a new subsection 546(g) to extend similar protections against the trustee's avoiding powers for transfers or payments under a swap agreement, made by or to a swap participant.

Section 4 amends section 546(d)(2) by adding a new paragraph (D) which provides that a swap participant that receives a transfer in connection with a swap agreement takes for value to the extent of the transfer. This protects a swap participant from fraudulent conveyance exposure to the extent that it has received payments or transfers under or in connection with a swap agreement.

Section 5 adds a conforming amendment to the setoff provisions of section 553(b) to protect setoffs of the kind encompassed by new subsection 362(b)(14) from recovery by a bankruptcy trustee, even when such setoffs occur before the filing of the bankruptcy petition.

Section 6 of the bill would amend section 556 of the Code. Section 556 generally provides that the contractual right of a forward contract cannot be stayed, avoided or otherwise limited because of the insolvency or bankruptcy of the other party to the contract. The bill would amend section 556 expressly to provide that such a contractual right includes "a right, whether or not evidenced in writing, arising under common law, under law merchant or by reason of normal business practice." This language is identical to language that now appears in Section 559 of the Code. Section 559 serves the same purpose with respect to certain repurchase agreements that section 556 serves with respect to forward contracts.

Section 7 of the bill adds new section 560 to give swap participants the same protection that sections 555, 556, and 559 give to participants to security contracts, commodities contracts, forward contracts, and repurchase agreements. Section 560 provides that the contractual rights of a swap participant to cause the termination of a swap agreement due to the insolvency of the debtor or the commencement of a case under the Code, or the right to set off or net out termination values or payment amounts arising under or in connection with one or more swap agreements, can not be stayed, avoided or otherwise limited by the Code or by any court or administrative agency in any case under the Code. This provision means that these contractual rights are not to be interfered with by any court proceeding under the Code, including a stay otherwise authorized by Code section 105. The term "contractual right" as used in this section is identical to the provisions of section 559.

VII. Cost Estimate

In accordance with paragraph 11(a), rule XXVI, of the Standing Rules of the Senate, the committee offers the report of the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, March 30, 1990.

Hon. JOSEPH R. BIDEN, Jr.,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed S. 396, an act to amend title 11 of the United States Code, the Bankruptcy Code, regarding swap agreements and forward contracts, as ordered reported by the Senate Committee on the Judiciary, March 22, 1990.

We estimate that no cost to the federal government or to state or local governments would result from enactment of this bill. S. 396 would amend the bankruptcy code to exempt swap agreements and forward contracts from automatic stay provisions in bankruptcy proceedings.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Mitchell Rosenfeld, who can be reached at 226-2860.

Sincerely,

ROBERT F. HALE
(For Robert D. Reischauer).

VIII. REGULATORY IMPACT STATEMENT

Pursuant to paragraph 11(b), rule XXVI, of the Standing Rules of the Senate, the committee, after due consideration, concludes that this act will not have direct regulatory impact.

IX. CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI, of the Standing Rules of the Senate, changes in existing law made by S. 396 as reported are as follows:

UNITED STATES CODE

* * * * * * *

TITLE 11—BANKRUPTCY

* * * * * * *

CHAPTER 1—GENERAL PROVISIONS

§ 101. Definitions

In this title—

(1) "accountant" means accountant authorized under applicable law to practice public accounting, and includes professional accounting association, corporation, or partnership, if so authorized;

(2) "affiliate" means—

* * * * * * *

(24) "forward contract" means a contract (other than a commodity contract) for the purchase, sale, or transfer of a commodity, *as defined in section 761(8) of this title, or any similar good, article, service, right, or interest which is presently or in the future becomes the subject of dealing in the forward contract trade*, or product or byproduct thereof, with a maturity date more than two days after the date the contract is entered into, *including, but not limited to, a repurchase transaction, reverse repurchase transaction, consignment, lease, swap, hedge transaction, deposit, loan, option, allocated transaction, unallocated transaction, or any combination thereof or option thereon;*

(25) "forward contract merchant" means a person whose business consists in whole or in part of entering into forward contracts as or with merchants in [commodities] *a commodity, as defined in section 761(8) of this title, or any similar good, article, service, right, or interest which is presently or in the future becomes the subject of dealing in the forward contract trade;*

* * * * * * *

[(52)] *(32)* "intellectual property" means—

(A) trade secret;

(B) invention, process, design, or plant protected under title 35;

(C) patent application;

(D) plant variety;

(E) work of authorship protected under title 17; or

(F) mask work protected under chapter 9 of title 17;

to the extent protected by applicable non-bankruptcy law; and

[(32)] *(33)* "judicial lien" means lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding;

[(33)] *(34)* "lien" means charge against or interest in property to secure payment of a debt or performance of an obligation;

(35) "margin payment" means, for purposes of the forward contract provisions of this title, payment or deposit of cash, a security or other property, that is commonly known in the forward contract trade as original margin, initial margin, maintenance margin, or variation margin, including market to market payments or variation payments;

[(53)] *(36)* "mask work" has the meaning given it in section 901(a)(2) of title 17;

[(34)] *(37)* "municipality" means political subdivision of public agency or instrumentality of a State;

[(35)] *(38)* "person" includes individual, partnership, and corporation, but does not include governmental unit, *Provided, however,* That any governmental unit that acquires an asset from a person as a result of operation of a loan guarantee agreement, or as receiver or liquidating agent of a person, will be considered a person for purposes of section 1102 of this title.

[(36)] *(39)* "petition" means petition filed under section 301, 302, 303, or 304 of this title, as the case may be, commencing a case under this title;

[(37)] *(40)* "purchaser" means transferee of a voluntary transfer, and includes immediate or mediate transferee of such a transferee;

[(38)] *(41)* "railroad" means common carrier by railroad engaged in the transportation of individuals or property or owner of trackage facilities leased by such a common carrier;

[(39)] *(42)* "relative" means individual related by affinity or consanguinity within the third degree as determined by the common law, or individual in a step or adoptive relationship within such third degree;

[(40)] *(43)* "repo participant" means an entity that, on any day during the period beginning 90 days before the date of the filing of the petition, has an outstanding repurchase agreement with the debtor;

[(41)] *(44)* "repurchase agreement" (which definition also applies to a revers repurchse agreement) means an agreement, including related terms, which provides for the transfer of certificates of deposit, eligible bankers' acceptances, or securities that are direct obligations of, or that are fully guaranteed as to principal and interest by, the United States or any agency of the United States against the transfer of funds by the transferee of such certificates of deposit, eligible bankers' acceptances, or securities with a simultaneous agreement by such transferee to transfer to the transferor thereof of certificates of deposit, eligible bankers' acceptances, or securities as described above, at a date certain not later than one year after such transfer or on demand, against the transfer of funds;

[(42)] *(45)* "securities clearing agency" means person that is registered as a clearing agency under section 17A of the Securities Exchange Act of 1934 (15 U.S.C. 78q–1) or whose business is confined to the performance of functions of a clearing agency with repect to exempted securities, as defined in section 3(a)(12) of such Act (15 U.S.C. 78c(12)) for the purposes of such section 17A;

[(43)] *(46)* "security"—

(A) includes—

* * * * * * *

[(44)] *(47)* "security agreement" means agreement that creates or provides for a security interest;

[(45)] *(48)* "security interest" means lien created by an agreement;

(49) "settlement payment" means, for purposes of the forward contract provisions of this title, a preliminary settlement payment, a partial settlement payment, an interim settlement payment, a settlement payment on account, a final settlement payment, a net settlement payment, or any other similar payment commonly used in the forward contract trade;

[(46)] *(50)* "State" includes the District of Columbia and Puerto Rico, except for the purpose of defining who may be a debtor under chapter 9 of this title;

[(47)] *(51)* "statutory lien" means lien arising solely by force of a statute on specified circumstances or conditions, or lien of distress for rent, whether or not statutory, but does not include security interest or judicial lien, whether or not such interest or lien is provided by or is dependent on a statute and whether or not such interest or lien is made fully effective by statute;

[(48)] *(52)* "stockbroker" means person—

(A) with respect to which there is a customer, as defined in section 741(2) of this title; and

(B) that is engaged in the business of effecting transactions in securities—

(i) for the account of others; or

(ii) with members of the general public, from or for such person's own account;

(53) "swap agreement" means an agreement, including terms and conditions incorporated by reference therein, which is a rate swap agreement, basis swap, forward rate agreement, commodity swap, interest rate option purchased, forward foreign exchange agreement, rate cap agreement, rate floor agreement, rate collar agreement, currency swap agreement, cross-currency rate swap agreement, currency option purchased or any other similar agreement or combination thereof (including any option to enter into any of the foregoing), and a master agreement for any of the foregoing together with all supplements shall be considered one swap agreement;

(54) "swap participant" means an entity that, on any day before the date of the filing of the petition, has an outstanding swap agreement with the debtor;

[(49)] *(55)* "timeshare plan" means and shall include that interest purchased in any arrangement, plan, scheme, or similar device, but not including exchange programs, whether by membership, agreement, tenancy in common, sale, lease, deed, rental agreement, license, right to use agreement, or by any other means, whereby a purchaser, in exchange for consideration, receives a right to use accommodations, facilities, or recreational sites, whether improved or unimproved, for a specific period of time less than a full year during any given year, but not necessarily for consecutive years, and which extends for a period of more than three years. A "time-share interest" is that interest purchased in a timeshare plan which grants the purchaser the right to use and occupy accommodations, facilities, or recreational sites, whether improved, pursuant to a time-share plan.

[(50)] *(56)* "transfer" means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property, including retention of title as a security interest and foreclosure of the debtor's equity of redemption;

[(51)] *(57)* "United States", when used in a geographical sense, includes all locations where the judicial jurisdiction of

the United States extends, including territories and possessions of the United States.

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CHAPTER 3—CASE ADMINISTRATION

§ 362. Automatic stay

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a)(3)), operates as a stay, applicable to all entities, of—

* * * * * * *

(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a)(3)), does not operate as a stay—

* * * * * * *

(6) Under subsection (a) of this section, of the setoff by a commodity broker, forward contact merchant, stockbroker, financial institutions, or securities clearing agency of any mutual debt and claim under or in connection with commodity contracts, as defined in section 761(4) of this title, forward contracts, or securities contracts, as defined in section 741(7) of this title, that constitutes the setoff of a claim against the debtor for a margin payment, as defined in section [741(5) or 761(15)] *section 101(35), 741(5), or 761(15)* of this title, or settlement payment, as defined in [section 741(8)] *section 101(49) or 741(8)* of this title, arising out of commodity contracts, forward contracts, or securities contracts against cash, securities, or other property held by or due from such commodity broker, forward contract merchant, stockbroker, financial institutions, or securities clearing agency to margin, guarantee, secure, or settle commodity contracts, forward contracts, or securities contracts;

* * * * * * *

(12) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Transportation under the Ship Mortgage Act, 1920 (46 App. U.S.C. 911 et seq.) (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage, or a security interest in or relating to a vessel or vessel under construction, held by the Secretary of Transportation under section 207 of title XI of the Merchant Marine Act, 1936 (46 App. U.S.C. 1117 and 1271 et seq., respectively), or under applicable State law; [or]

(13) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commence-

ment or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Commerce under the Ship Mortgage Act, 1920 (46 App. U.S.C. 911 et seq.) (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage, in a vessel or a mortgage, deed of trust, or other security interest in fishing facility held by the Secretary of Commerce under section 207 of title XI of the Merchant Marine Act, 1936 (46 App. U.S.C. 1117 and 1271 et seq., respectively)[.] *or*

(14) under subsection (a) of this section, of the setoff by a swap participant, of any mutual debt and claim under or in connection with one or more swap agreements that constitutes the setoff of a claim against the debtor for any payment due from the debtor under or in connection with swap agreements against any payment due to the debtor from the swap participant under or in connection with the swap agreements or against cash securities, or other property of the debtor held by or due from such swap participant to guarantee, secure or settle swap agreements.

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CHAPTER 5—CREDITORS, THE DEBTOR, AND THE ESTATE

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§ 546. Limitations on avoiding powers

(a) An action or proceeding under section 544, 545, 547, 548, or 553 of this title may not be commenced after the earlier of—

(1) two years after the appointment of a trustee under section 702, 1104, 1163, 1302, or 1202 of this title; or

(2) the time the case is closed or dismissed.

* * * * * * *

(e) Notwithstanding sections 544, 545, 547, 548(a)(2), and 548(b) of this title, the trustee may not avoid a transfer that is a margin payment, as defined in [section 741(5) or 761(15)] *section 101(35), 741(5) or 761(15)* of this title, or settlement payment, as defined in [section 741(8)] *section 101(49) or 741(8)* of this title, made by or to a commodity broker, forward contract merchant, stockbroker, financial institution, or securities clearing agency, that is made before the commencement of the case, except under section 548(a)(1) of this title.

(f) Notwithstanding sectins 544, 545, 547, 548(a)(2), and 548(b) of this title, the trustee may not avoid a transfer that is a margin payment, as defined in section 741(8) of this title, or settlement payment, as defined insection 741(8) of this title, made by or to a repoparticiapnt, in connection with a repurchase agreement and that is made before the commencement of the case, except under section 548(a)(1) of this title.

(g) Notwithstanding sections 544, 545, 547, 548(a)(2) and 548(b) of this title, the trustee may not avoid a transfer under a swap agreement, made by or to a swap participant, in connection with a swap

agreement and that is made before the commencement of the case, except under section 548(a)(1) of this title.

* * * * * * *

§ 548. Fraudulent transfers and obligations

(a) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily—

* * * * * * *

(d)(1) For the purposes of this section, a transfer is made when such transfer is so perfected that a bona fide purchaser from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest in the property transferred that is superior to the interest in such property of the transferee, but if such transfer is not so perfected before the commencement of the case, such transfer is made immediately before the date of the filing of the petition.

(2) In this section—

(A) "value" means property, or satisfaction or securing of a present or antecedent debt of the debtor, but does not include an unperformed promise to furnish support to the debtor or to a relative of the debtor;

(B) a commodity broker, forward contract merchant, stockbroker, financial institution, or securities clearing agency that receives a margin payment, as defined in **[**section 741(5) or 761(15)**]** *section 101(35), 741(5), or 761(15)* of this title, or settlement payment, as defined in **[**section 741(8)**]** *section 101(49) or 741(8)* of this title, takes for value to the extent of such payment; **[**and**]**

(C) a repo participant that receives a margin payment, as defined in section 741(5) or 761(15) of this title, or settlement payment, as defined in section 741(8) of this title, in connection with a repurchase agreement, takes for value to the extent of such payment**[**.**]**; *and*

(D) a swap participant that receives a transfer in connection with a swap agreement, as defined in section 101(53) of this title, takes for value to the extent of such transfer.

* * * * * * *

§ 553. Setoff

(a) * * *

(b)(1) Except with respect to a setoff of a kind described in section 362(b)(6), 362(b)(7), *362(b)(14),* 365(h)(2), or 365(i)(2) of this title, if a creditor offsets a mutual debt owing to the debtor against a claim against the debtor on or within 90 days before the date of the filing of the petition, then the trustee may recover from such creditor the amount so offset to the extent that any insufficiency on the date of such setoff is less than the insufficiency on the later of—

(A) 90 days before the date of the filing of the petition; and

(B) the first date during the 90 days immediately preceding the date of the filing of the petition on which there is an insufficiency.

* * * * * * *

§ 556. Contractual right to liquidate a commodities contract or forward contract

The contractual right of a commodity broker or forward contract merchant to cause the liquidation of a commodity contract, as defined in section 761(4), or forward contract because of a condition of the kind specified in section 365(e)(1) of this title, and the right to a variation or maintenance margin payment received from a trustee with respect to open commodity contracts or forward contracts, shall not be stayed, avoided, or otherwise limited by operation of any provision of this title or by the order of a court in any proceeding under this title. As used in this section, the term "contractual right" includes a right set forth in a rule or bylaw of a clearing organization or contract market or in a resolution of the governing board thereof[.] *and a right, whether or not evidenced in writing, arising under common law, under law merchant or by reason of normal business practice.*

* * * * * * *

§ 560. Contractual right to terminate a swap agreement

The exercise of any contractual rights of a swap participant to cause the termination of a swap agreement because of a condition of the kind specified in section 365(e)(1) of this title or to set off or net out any termination values or payment amounts arising under or in connection with one or more swap agreements shall not be stayed, avoided, or otherwise limited by operation of any provision of this title or by order of a court or administrative agency in any proceeding under this title. As used in this section, the term "contractual right" includes a right, whether or not evidenced in writing, arising under common law, under law merchant or by reason of normal business practice.

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